IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE C. GOULEY, Appellant.	No. 37580-0-II UNPUBLISHED OPINION

Bridgewater, P.J. — Jesse C. Gouley appeals his jury convictions for possession of a stolen vehicle (count II) and first degree unlawful possession of a firearm (count III).[1] We accept the State's concession that an instructional error warrants vacation of Gouley's unlawful possession of a firearm conviction (count III). We also reverse without prejudice Gouley's conviction for possession of a stolen vehicle (count II), holding that the information charging that offense was insufficient. Accordingly, we reverse Gouley's convictions for counts II and III and

[1] The jury also convicted Gouley of unlawful possession of methamphetamine (count I) and false reporting (count IV), but he does not challenge those convictions.

remand for further proceedings.

Facts

On January 12, 2008, sheriff's deputies responded to a call that a stolen car had been located at a Mason County residence. While at the residence, the deputies were dispatched to a nearby location where a caller reported a stabbing. Upon arriving at the purported location of the stabbing, the officers found no indication of any disturbance.

While deputies investigated the stabbing, another deputy reported that he was following a suspicious vehicle near the scene where the stolen car had been found and would be conducting a traffic stop. The deputy stopped the suspicious vehicle because it had no visible license plate. One of the passengers, later identified as Gouley, was not wearing a seat belt, refused to produce identification, and became belligerent during the traffic stop. Because Gouley refused to keep his hands where the deputy could see them, the deputy removed Gouley from the car to conduct a protective weapons search. Gouley repeatedly pulled away from the deputy, so the deputy handcuffed Gouley to facilitate the weapons frisk.

During the frisk, the deputy found a smoking device encrusted with white crystal residue, and arrested Gouley for possession of methamphetamine. During a search incident to the arrest, the deputy also discovered a cell phone and a set of car keys matching the make of the stolen car that had been found nearby. While these items were being taken into custody, Gouley's cell phone rang and a deputy answered it, discovering that it was the 911 dispatch calling back the number that had reported the non-existent stabbing.

After the deputies booked Gouley, they returned to the stolen car, which was now in an

impound yard, and used the car keys found on Gouley's person to unlock the stolen car. The deputies conducted an inventory search of the stolen car and found a firearm on the driver's side of the car and a packet of pictures of Gouley in the glove compartment.

The State charged Gouley by amended information with one count of unlawful possession of methamphetamine (count I), one count of possession of a stolen vehicle (count II), one count of first degree unlawful possession of a firearm (count III), and one count of false reporting, a gross misdemeanor (count IV). The matter proceeded to a jury trial. Gouley stipulated to having a prior offense that precluded his possession of a firearm for purposes of the unlawful possession of a firearm charge (count III).

Testimony at trial relayed events as above described. The owner of the stolen car, Jim Johnston, also testified that his car had been taken on the morning of January 9, 2008, while he was in a convenience store getting a cup of coffee. He further testified that he did not know Gouley, had never given Gouley permission to drive his car, and that he did not own the firearm that was found in his car. Gouley did not testify.

The jury found Gouley guilty as charged on all counts. The court sentenced Gouley based on undisputed offender scores to standard range sentences of 24 months on count I, 57 months on count II, 114 months on count III, and to 365 days on count IV, with all sentences running concurrently. The court also imposed 9 to 12 months of community custody. Gouley filed a timely notice of appeal.

Discussion

Gouley raises five issues. First, he contends that the trial court erred in giving instruction 23, the "to convict" instruction for the charge of first degree unlawful possession of a firearm (count III), because the instruction omitted the essential element of knowledge. Second, he contends that his trial counsel was ineffective for failing to object to instruction 23. Third, he contends that the information was defective regarding the charge of possession of a stolen vehicle (count II). Fourth, he contends that remand for resentencing is necessary because his combined incarceration term and community custody period exceed the statutory maximum sentence. Fifth, and finally, Gouley contends that his trial counsel was ineffective for failing to argue that his total sentence exceeded the statutory maximum.

As a threshold matter, the State concedes that knowledge is an essential element of first degree unlawful possession of a firearm and thus, Gouley's conviction and sentence for count III should be vacated. We accept the State's concession and vacate Gouley's conviction and sentence for count III.[2] In light of this concession, the State asks us to remand Gouley's case for resentencing as to his remaining convictions (counts I, II, and IV). The State's concession resolves four of Gouley's five asserted issues as listed above.[3] All that remains is Gouley's

[2] Knowledge is an implied element where unlawful possession of a firearm in violation of RCW 9.41.040 is charged. *See State v. Barnes*, 153 Wn.2d 378, 384-85, 103 P.3d 1219 (2005) (citing *State v. Anderson*, 141 Wn.2d 357, 363-66, 5 P.3d 1247 (2000)).

[3] Gouley's first issue, instructional error, is directly resolved by the State's concession on the matter. His second issue, ineffective assistance for trial counsel's failure to object to the faulty instruction, is rendered moot by the State's concession. Remand for resentencing, Gouley's fourth issue, is required by the vacation of his conviction and sentence on count III. Moreover, because remand for resentencing will be required in any event because of the vacation of Gouley's conviction and sentence on count III, Gouley's fifth issue, asserting ineffective assistance for

challenge to the sufficiency of the information regarding the charge of possession of a stolen vehicle (count II).

It is well settled that a charging document satisfies constitutional requirements only if it states all the essential elements of the crime charged, both statutory and nonstatutory. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If a charging document is challenged for the first time on review, it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document. *McCarty*, 140 Wn.2d at 425 (citing *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991)). However, if the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it. *McCarty*, 140 Wn.2d at 425; *State v. Moavenzadeh*, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998).

Here, Gouley challenges the information for the first time on appeal. Reading the information liberally, we employ the two-prong test articulated in *Kjorsvik*: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. *McCarty*, 140 Wn.2d at 425; *Kjorsvik*, 117 Wn.2d at 105-06. If the necessary elements are not found or fairly implied, however, we will presume prejudice and reverse without reaching the question of prejudice. *McCarty*, 140 Wn.2d at 425-26.

---

counsel's failure to object to Gouley's sentence, is rendered moot. We need not discuss these issues further. *Schmidt v. Cornerstone Invs., Inc*., 115 Wn.2d 148, 165, 795 P.2d 1143 (1990) (reviewing court need not decide all the issues raised by the parties, but only those that are determinative).

Count II charges Gouley with possession of a stolen vehicle as follows:

> In the County of Mason, State of Washington, on or about the 12th day of January, 2008, the above-named defendant, JESSE C. GOULEY, did commit POSSESSION OF A STOLEN MOTOR VEHICLE, a Class B Felony, in that said defendant did possess a stolen motor vehicle, to-wit: a green 1996 Toyota Avalon bearing Washington License 144-MRH; contrary to RCW 9A.56.068 and against the peace and dignity of the State of Washington.

CP at 59. RCW 9A.56.068 provides that "[a] person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1).[4] Moreover, knowledge is a required element where possession of stolen property is charged. *Moavenzadeh*, 135 Wn.2d at 362; *see also State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967) (knowledge of wrongful taking of automobile is an essential element of the offense of riding in a motor vehicle knowing the same to have been taken without permission of owner or person entitled to possession thereof).

Here, the non-statutory essential element of knowledge is neither expressly nor impliedly included in the information language charging count II. Accordingly prejudice is presumed and reversal is required. *McCarty*, 140 Wn.2d at 425-26, 428; *Moavenzadeh*, 135 Wn.2d at 363-64 (information's stolen property counts were constitutionally deficient because they contained no language that could fairly be read to allege that defendant knew the property was stolen).

Pointing to the above quoted language from RCW 9A.56.068, the State contends that the charging document contained all of the essential elements. But, as discussed, the information fails

[4] Possession of a stolen vehicle became a separate crime in 2007. *See* RCW 9A.56.068; Laws of 2007 ch. 199, § 5 (effective July 22, 2007). Prior to 2007, the crime was charged under the possession of stolen property statutes. *See* RCW 9A.56.140(1); former RCW 9A.56.150(1) (1995); Laws of 2007 ch. 199, § 6; *State v. Rhinehart*, 92 Wn.2d 923, 925, 602 P.2d 1188 (1979).

to mention the required common law element of knowledge.

The State next notes that the "to convict" instruction for count II properly required the jury to find that Gouley "knowingly possessed a stolen motor vehicle." Br. of Resp't at 6; CP at 47 (instruction 19). Pointing to the required element of knowledge appearing in the jury instruction, the State contends that Gouley was adequately apprised of the count II charge to prepare a defense. But such notice *during trial* is not sufficient. *McCarty*, 140 Wn.2d at 427 (notice of the charge on which a defendant will be tried must be given prior to the opening statement of the trial).

The State also argues that any error was harmless, applying the "overwhelming untainted evidence" test noted in *State v. Flores*, 164 Wn.2d 1, 18-19, 186 P.3d 1038 (2008). But the *Flores* court applied that standard to a defendant's challenge regarding the trial court's admission of allegedly improper evidence. That is not the circumstance here. Instead, *McCarty* supplies the appropriate analysis for testing the sufficiency of a charging document. Accordingly, for the reasons discussed, we hold that the information charging Gouley with possession of a stolen vehicle in count II was deficient because it neither explicitly stated nor fairly implied the necessary element of knowledge. We dismiss Gouley's conviction on count II without prejudice to subsequent prosecution based upon a new information. *McCarty*, 140 Wn.2d at 428.

We reverse Gouley's convictions for counts II and III and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so

ordered.

Bridgewater, P.J.

We concur:

Armstrong, J.

Hunt, J.